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# In the Supreme Court
## of the United States

OCTOBER TERM, 1968

STATE OF OREGON, Ex Rel WESTERN SEED PRODUCTION CORPORATION,

*Petitioner,*

v.

J. R. CAMPBELL, As Judge of the Circuit Court of the State of Oregon for Malheur County,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON**

# BRIEF FOR RESPONDENT IN OPPOSITION

*To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States*

Comes now J. R. Campbell, as Judge of the Circuit Court of the State of Oregon for Malheur County, respondent herein, and in opposition to the petition for writ of certiorari herein submits the following:

## STATEMENT OF THE CASE

Procedurally, this case was at the complaint stage when petitioner challenged the assertion of state jurisdiction at the trial court level. Thereafter, the matter was reviewed, by way of mandamus, by the Supreme Court

of Oregon. The matter is now before this Court, on application for writ of certiorari, still in the pleading stages, the only record being the pleadings and affidavits referred to in petitioner's brief.

In addition to the facts set forth in petitioner's brief, the Court should note the following:

(a) This case is but one of 140 to 150 other cases instituted by other local growers against the same defendants (including petitioner) involving the same seed involved in this case. (Note that reference to this point was made by petitioner in its brief to the Oregon Supreme Court on mandamus.)

(b) From the pleadings and record before it, the Oregon Supreme Court specifically found:

> "In the case at bar, the plaintiffs have asserted that Western Seed propagated and multiplied defective seed in Arizona knowing that the seed would be planted by growers in Oregon and Idaho. Such allegations sufficiently describe conduct producing foreseeable consequences in Oregon and circumstances justifying long-arm jurisdiction in this case.
>
> "If Western Seed had established by its affidavits supporting its motion to quash that the sale out of which the pending action arose was an isolated transaction, and that Western Seed did not engage in interstate commerce, we might have a different question. (See p. 29 of Petitioner's brief)"

## QUESTION PRESENTED

(a) *Generally:* Can a state constitutionally assert

jurisdiction over a foreign corporation on the basis of a negligent act committed outside of the state causing injury within the state?

(b) *Specific question:* Can the State of Oregon constitutionally assert jurisdiction over petitioner, a foreign corporation, on the grounds that petitioner negligently multiplied and propagated sugar beet seed in Arizona for *use* in Oregon causing growers to suffer damage within the forum state?

## ARGUMENT

Petitioner, commencing at p. 10 of its petition, argues that because of the many states enacting long-arm statutes, and the Uniform Commercial Code, it is the province of this Court to review this case and thereby standardize the interpretations of statutes. Such, however, is not within the province of this Court — *constitutionality* as opposed to *uniformity* being the sole basis upon which the writ may be granted. 28 U.S.C.A. § 1257 (3). Divergent interpretations of similar statutes in different states have always been and always will be extant; no federal questions arise by reason of this condition. *Building Service Emp. Intern. Union, Local 262 v. Gazzam,* 70 S. Ct. 784, 339 U.S. 532, 94 L. Ed. 1045.

Rule 19, *Rules of the Supreme Court of the United States,* provides *inter alia:*

"A review on writ of certiorari is not a matter of right,

but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Petitioner by application for the writ now seeks to have this Court establish *specific* guidelines for the assertion of state jurisdiction over foreign corporations, i. e., "Confusion and litigation can be eliminated if this Court will end speculation as to how far it will 'let them go'." (Pet. Br. p. 10) The problem, of course, is that due process considerations of the extent of a state's jurisdiction are not susceptible to reduction to formula or specific guidelines greater than has already been enunciated by the Court. As stated by this Court per Stone, C.J., in the case of *International Shoe Co. v. State of Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945):

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply *mechanical* or *quantitative*." (emphasis added)

Despite the arguments of petitioner to the contrary, this Court heretofore has established the general basis upon which the issue of due process is to be interpreted in the area of state jurisdiction over non-residents:

(a) Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain "*minimum contacts*" so that the maintenance of the suit does not "*offend traditional notions of fair play and substantial justice*". *International Shoe Co. v. Washington, supra.*

(b) Within the context of the *International Shoe* doctrine, jurisdiction may be based upon the commission of a *single act*[1] having effect in the forum state. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957); *Rosenblatt v. American Cyanamid Co.*, 15 L. Ed. 2d 39, 86 S. Ct. 1 (1965)[2].

(c) Due process requires that the defendant by some act "purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws". *Hanson v. Denckla,* 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958).

Admittedly, there have been numerous state and federal court cases involving similar issues of jurisdiction; however, as indicated above, this is not an area where the Court can provide symmetry by setting forth hard and fast guidelines. One question that perplexed courts for some time concerned the issue of "tortious act within the state". Most courts have now answered this question similar to the pattern established by the Illinois court —

the term has been construed to include the ultimate injury or damage based upon the well-established doctrine that the place of the wrong is where the last event takes place which is necessary to render the actor liable, e.g., *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 761 (1961); *Golden Gate Hop Ranch, Inc., v. Velsicol Corp.*, 66 Wn. 2d 469, 403 P. 2d 351, cert. den. 382 U.S. 1025, 15 L. Ed. 2d 539, 86 S. Ct. 644; *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P. 2d 932 (1966)[3].

As to the requirement that the defendant must purposefully avail itself of the privilege of conducting activities within the state, it has been held to include the engaging in activities under circumstances that defendant knows or has reason to know that these activities may have substantial consequences in the forum state. *Phillips*

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[1]In the **McGee** case, in footnote 2 of the opinion, this Court referred with approval to the case of **Smyth v. Twin State Improv. Corp.**, 116 Vt. 569, 80 A. 2d 664, wherein the state court upheld statute which predicated jurisdiction upon the commission by a foreign corporation of a single tort within the state.

[2]Note the **Rosenblatt** case was before this court in the same procedural context as the instant case, i.e., defendant's jurisdictional attack of the pleadings.

[3]The New York court was unwilling to accept the approach of the **Gray** case and ruled to the contrary in the case of **Longines-Wittnauer Watch Co. v. Barnes Reinecke, Inc.**, 15 N.Y. 2d 443, 261 NYS 2d 8, 209 N.E. 2d 68 (1965), cert. den. 382 U.S. 905 (1966). Thereafter, the New York legislature amended its statute (effective September 1, 1966), N.Y. Civil Practice Law and Rules § 302 — the effect of which was to substantially codify the **Gray** rule.

*v. Anchor Hocking Glass Corp., supra.*[4] In the context of the present case, plaintiff alleged and the Oregon Supreme Court specifically found that the multiplying and propagation of seed *for use* in Oregon constituted substantial consequences in the forum state so as to assert jurisdiction.

In summary, the sole question before this Court is whether the assertion of jurisdiction by Oregon over the petitioner offends traditional notions of fair play and substantial justice. Respondent submits the question must be answered in the negative and certiorari be denied for the following reasons:

1. Even though petitioner was not physically present in the state, its activities of multiplying and propagating seed *for use*[5] in Oregon was a sufficient minimum contact with the state so as to support the assertion of jurisdiction.

2. The State of Oregon has a substantial interest in the controversy by reason of the large number of local growers who have sustained damages as a result of petitioner's activities.

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[4]The **Phillips** opinion contains an excellent analytical discussion of the long-arm statutes, and should be read in its entirety.

[5]Note that in the **Gray** and **Phillips** cases, **supra,** foreseeability of consequences within the forum state was predicted on the fact that the defendant put its products in the stream of interstate commerce. In the instant case, the requirements of **Hanson v. Denckla,** "purposely avails", is clearer than in the cited cases because of the specific averment that the seed was multiplied and propagated for use in the forum state.

3. The issues that will be brought forth at trial will involve matters which occurred in the State of Oregon (thus necessitating local witnesses on behalf of both plaintiffs and defendants), to-wit: the planting, cultivating, etc., of the seed and the actual physical damages sustained by the crops.

4. No contention is made by petitioner that it did not have fair notice of the suit, or that it will be treated unfairly in the courts of Oregon, or that it cannot properly defend within the state.

5. Finally, there is no merit in the contentions by petitioner that plaintiffs' claims against other defendants have effect on the jurisdictional issue of the case. Paraphrasing petitioner's argument, it appears it now is saying that since the plaintiffs have the right to go after one or more of the other defendants then it is "unfair" for the Oregon court to assert jurisdiction over it (petitioner). In other words, "why do something in one suit when it can be done in many?". Obviously, the question answers itself and has no bearing on the issues involved herein. Parenthetically, it should be noted that as a matter of substantive law, a party may be unsuccessful in his claim in warranty against his immediate seller and still successfully prosecute his claim in negligence against a remote party in the distribution process. *Nakanishi v. Foster*, 64 Wn. 2d 647, 393 P. 2d 635 (1964). Thus, petitioner's argument is at most a *non sequitir*.

In answer to the contention that the Oregon court erred in not requiring affidavits from the plaintiffs, suffice it to say that this it not a matter of this Court's cognizance and should be discussed no further. *Milk Wagon Driver's Union of Chicago, Local 753 v. Meadowmoor Dairies,* 61 S. Ct. 552, 312 U.S. 287, 85 L. Ed. 836.

Finally, petitioner argues on p. 16 of its petition that the Oregon assertion of jurisdiction in the instant case constitutes an unreasonable burden on interstate commerce. No authority is cited nor argument made why the assertion of jurisdiction in this case unduly burdens interstate commerce. In answer to petitioner's contention, respondent refers the Court to a recent study by Professor William Schwartz entitled "An Outline of Key Developments in Conflict of Laws and Long-Arm Statutes in Products Liability Litigation" (published by American Trial Lawyers Association, 1967-1968). In connection with the commerce clause, the author states as follows:

> "In some states, jurisdiction may be based upon the fact of the defendants having engaged in interstate or international commerce. Thus, the New York statute, as amended in 1966, provides that jurisdiction exists where a defendant 'commits a tortious act without the state causing injury to person or property within the state . . . if he (ii) expects or should reasonably expect the act to have consequences in the state and derive substantial revenue from interstate or international commerce'. Defendants may claim that the exercise of jurisdiction under such a provision constitutes an unconstitutional burden on interstate

commerce. See *Erlanger Mills, Inc., v. Cohoes Fibre Mills, Inc.*, 239 F. 2d 502 (4th Cir. 1956). It is highly unlikely that this contention will have much vitality. First of all, the Constitution only proscribes unreasonable burdens on interstate commerce. The test of reasonableness should be the same under the commerce clause as it is under the due process clause. Second of all, the commerce clause is concerned not merely with this particular defendant but with all others who may be deterred from engaging in such commerce if jurisdiction were to be sustained in this case. 'If this were true, the answer would seem to be: The nation's public interest, as presently conceived, calls for an open economy in a federal society, but it sanctions state action that imposes correlative duties on those who enjoy the privileges of unhampered access to nationwide or worldwide markets. Thus the states have authority to insist that those operating in these markets on a substantial scale appear, in carefully defined situations, at a tort victim's forum to litigate his claim against them.' Homberger and Laufer, *Expanding Jurisdiction*, 16 Buffalo Law Review 67, 80 (1966)."

## CONCLUSION

The petition for writ of certiorari is sought on the basis that this Court should set forth specific rules or tests to determine whether or not long-arm statutes or decisions violate the due process clause; only general rules or tests can be established, and this Court has already made such determinations. The Oregon statute does not violate the due process clause nor does it unreasonably burden interstate commerce; the decision of the Supreme Court of Oregon does not violate the due process clause or un-

reasonably burden interstate commerce. The petition should be denied.

Respectfully submitted,

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